92-247

NO. _____

Supreme Court, U.S.
FILED
AUG 4 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT SIMS,

Petitioner,

vs.

CITY OF SIDNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO, SHELBY COUNTY

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QUESTIONS PRESENTED

(1) Is it a violation of petitioner's constitutional rights for a police officer to issue a traffic ticket under Ohio Traffic Law, without personal knowledge of any facts constituting an offense or the oath of a person with personal knowledge of said offense?

TABLE OF CONTENTS

	Page
Questions Presented	I
Table of Contents	III
Table of Authorities	IV
Ohio Traffic Rule 11	IV
Federal Constitution 4th and 5th Amend.	V
Opinion Below	1
Jurisdiction	2
Statement of Facts	3
Reasoning for Granting Writ	5
Conclusion	6
APPENDIX	
Motion to Dismiss, Ex. C	1a
Judgment, Sidney Municipal Court, Ex. D	3a
Judgment affirming, Third Appellate District, Ex. E	5a
Journal Entry, Third Appellate District, Ex. F	8a
Journal Entry Overruling Motion to Certify, Ex. G	9a
Order of Ohio Supreme Court dismissing Motion for Order to Certify the Record, Ex. H	10a

TABLE OF AUTHORITIES

Page

Giles v. *Maryland*,
386 US 66, 87 S Ct 793, 17 L Ed 2d 737 (1966) 7

State v. *Coldwell*,
3 Ohio App 3d 283 (1982) 6, 8

State v. *Laughlin*,
10 Misc 219, 225 NE 2d 296 (1966) 8

State v. *Staten*,
14 App 3d 78, 470 NE 2d 249 (1964) 8

U.S. v. *McCord*,
501 F 2d 334, 341 6

MC SUP Rule 8 ..... 3, 5

Ohio Traffic Rule 11 ..... 3, 5, 6, 8

Traffic Rule 11 provides:

(A) Pleadings and Objections.
Pleadings in traffic cases should be the complaint, the plea of not guilty, guilty, and no contest. Defenses and objections shall be raised before plea and trial by motion to dismiss, or to grant appropriate relief.

(B) Motions before plea and trial.
Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before pleas.
(1) The following defenses and objections must be raised before plea:
(a) Defenses and objections based on defects in the institution of the prosecution.
(b) Defenses and objections based on defects in the complaint other than failure to show jurisdiction in the court or to charge an offense, which ob-

jections shall be noticed by the court at any time during the pendency of the proceeding.

(D) Disclosure of evidence by prosecuting attorney.

At the arraignment, or as soon thereafter as is practicable, the defendant may, in order to raise objections prior to trial under subsection (B)(2), request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Criminal Rule 16.

(E) A motion made before trial, other than a motion for change of venue, shall be timely determined before trial. When factual issues are involved in determining a motion, the court shall state its essential findings on the record.

U.S. Constitution

Fourth Amendment — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or information, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment — No person . . . be deprived of life, liberty, or property, without due process of law . . .

NO. _____

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OCTOBER TERM, 1992

ROBERT SIMS,

Petitioner,

vs.

CITY OF SIDNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO, SHELBY COUNTY

Petitioner, Robert Sims (hereinafter petitioner) respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Third Appellate Judicial District of Ohio, Shelby County, entered on December 5, 1991. (Ex. E, App. p. 5a) Motion to Certify was overruled by Court of Appeals on January 8, 1992. (Ex. F, App. p. 8a)

On May 6, 1992, the Ohio Supreme Court dismissed sua sponte petitioner's motion to certify the record. (Ex. G, App. p. 9a)

OPINION BELOW

On May 10, 1991, the Municipal Court of Sidney, Ohio failed to rule on petitioner's motion to dismiss charges on an

Ohio traffic ticket based upon alleged improper backing. (Ex. C, App. p. 1a) [violations of ORC 4511.38 and Sidney Municipal Code 331.12]

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 USC § 1257.

STATEMENT OF FACTS

On April 12, 1991, petitioner reported an accident. Officer Roamer of the Sidney police department responded to the call. Without making an investigation of the accident or taking any statements from any persons present at the scene, Officer Roamer told the party that hit petitioner's car, that he could go; and, without permitting petitioner to give an account of what had happened, arbitrarily gave Sims a traffic ticket, for allegedly, improper backing, pursuant to Sidney's Municipal Traffic Code § 331.12. (See ORC 4511.38) The traffic ticket was not based upon the personal knowledge or oath of any person. 11(A)

On or about April 22, 1991, petitioner filed an affidavit and pretrial motion to dismiss, pursuant to Ohio Traffic Rule 11(B). With personal knowledge that their was no evidence to support a conviction, the prosecutor did not respond to the motion to dismiss or in any way dispute claim that there was no evidence to support the alleged violation of Sidney Municipal Ordinance, 331.12. This was a violation of Ohio Traffic Rule 11(D).

At the trial, the Honorable Judge said he would rule on the motion to dismiss, Ohio Traffic Rule 11(E), but did not. At the trial, the prosecution did not make any argument or claim that petitioner was guilty of any charge. The Court said, it found petitioner guilty of failing to yield the right-of-way.

Petitioner files an appeal pursuant to Rules of Superintendence for Municipal and County Courts, (hereinafter MC Sup R, Rule 8(B)) and annexed typewritten portions of the videotape recording necessary to determine the question on appeal, which constituted a transcript of proceedings as defined in Appellate Rules 9(A). The prosecutor did not file a brief contradicting any portions of the transcript.

The facts of the case are not in dispute. But, the Court of Appeals, refused to accept the portions of the transcript necessary to determine the question presented, and character-

ized the appellate proceedings as a "Civil appeal from Municipal Court" instead of a "Criminal appeal from Municipal Court" and affirmed, stating:

> The record before us for review is a limited one consisting of the Clerk's Transcript of Docket and Journal Entries and the documents listed thereon. Although appellant, in his brief, has set forth statements purporting to be the paraphrased content of certain testimony and has appended other matter to that brief, we may not consider such to demonstrate claimed error in lieu of and in the absence of a properly certified transcript of the testimony and proceedings in the case, or one of the appropriate alternatives permitted by the Appellate Rules. It is the rule that assertions of fact contained in appellate briefs and attachments to them cannot substitute for the record or add to it. Citing *Paulin* v. *Midland Mutual Life Ins. Co.* (1974).

REASONS FOR GRANTING THE WRIT

(1) Is it a violation of petitioner's constitutional rights for a police officer to issue a traffic ticket under Ohio Traffic Law, without personal knowledge of any facts constituting an offense or the oath of a person with personal knowledge of said offense.

This case presents constitutional questions relating to persons who are charged with traffic violations (Ohio Traffic Rules) and the duty of the prosecutor to make good faith response to motions to dismiss, (Traf. Rule 11(D)) and make disclosure of fact that ticket issued without any support at law was void. (Traf. Rule 11(A))

This case was tried under Ohio Traffic Rule 11 and MC SUP 8. The proceedings were recorded on videotape. App. R. 9(A) provides that when such means are used, petitioner is required to transcribe those portions necessary to determine the question presented and to attach such portions to his brief. This is exactly what petitioner did. Meanwhile, M.C. SUP R 8(B) provides that a written transcript need not be provided where the issue on appeal is that the judgment is against the manifest weight of the evidence. Petitioner's assignment of error is essentially that there is no evidence to support giving him a ticket for improper backing, let alone finding him guilty of improper backing. Therefore, for purpose of appeal, the transcribed portion of the videotape annexed to brief was sufficient.

The Court of Appeals states it has a limited record on appeal. It does not mention the videotape by name, and we may assume the Clerk of the Court failed to send the videotape.

> MC SUP R 8 provides: A videotape constitutes the transcript of proceeding as defined in Appellate Rule 9(A) and such transcript need not be transcribed into written form for the purpose of appeal. Transcript of proceedings in media other than videotape must be transcribed into written form in their entirety. When

> the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of the transcript necessary for the Court to determine the question presented and append such portions of the transcript to their briefs. A party need not attach a typewritten copy of the entire transcript of proceedings where it is alleged that the judgment appealed from is against the manifest weight of the evidence.

CONCLUSION

The failure of the prosecutor to respond in the Court of Appeals is clear evidence that their was no evidence to support a conviction. The prosecutor committed plain error by not notifying the Court of Appeals that the Clerk of the Municipal Court had omitted the videotape.

> Doctrine of "plain error" encompasses those errors which are obvious, which affect the substantial rights of the accused, and which, if uncorrected, would be an affront to the integrity and reputation of judicial proceedings. *U.S.* v. *McCord*, 501 F 2d 334, 341.

The failure of the prosecutor to reply to the motion to dismiss was an admission that there was no evidence against Petitioner to support a conviction for any violation of Ohio law. Traf R 11(D). The Municipal Court's failure to rule on the motion to dismiss or state its essential findings on the record is further evidence of no evidence to support a conviction. Traf R 11(E).

The prosecutor was aware that the ticket issued by officer Roamer was invalid, because the ticket was based upon nonexistent facts and had a duty to petitioner to inform the Court. See *State* v. *Coldwell* (1982), 3 Ohio App. 3d 283.

A criminal prosecution is an adversary proceeding, and the prosecutor is expected to promote vigorously the public in-

terest in convicting criminals. This must be done, however, in the context of the constitutional rights guaranteed to a free people under the United States Constitution. Evidence to which an accused is entitled as a matter of due process or under Criminal Rules shall not be withheld or suppressed. *Giles* v. *Maryland* (1966), 386 US 66, 87 S Ct 793, 17 L Ed 2d 737. Every violation to the prejudice of defendant causes an unwarranted expenditure of time, effort and public money, taking into consideration the appeal . . .

The Court of Appeals erred in affirming Trial Court's conviction and sentence based upon the prosecutor's failure to bring to the Court's attention that there was no evidence to support the conviction. The Court of Appeals asserts that petitioner cannot demonstrate his error because (he) failed to provide a complete reocrd. The Court of Appeals said:

> It is readily apparent from appellant's argument that the error claimed can only be determined by review of the testimony of the witnesses heard by the Trial Court. In the absence of a transcript of that testimony, an agreed statement of facts and evidence or a statement in settlement of the record, we have nothing to review and as the function of this Court of Appeals is limited to review on appeal of the proceedings of the lower Court, we must presume the correctness and regularity of the proceedings below where the appellant had not fulfilled his obligation to show by the record that prejudicial error has occurred. There is nothing before us from which we can determine objectively the facts upon which a traffic citation was issued to appellant. Likewise, there is nothing before us from which we may determine the evidence upon which the Trial Court became convinced of appellant's guilt. Indeed, we have nothing before us to demonstrate the entire nature of the proceedings below, the rulings of the Trial Court or the evidence presented, save that reported in the judgment entry of conviction and sentence.

In Ohio, in the absence of evidence, the Municipal Court was without jurisdiction to proceed. *State* v. *Coldwell* (1982), 3 Ohio App. 3d 283. Hamilton County Court of Appeals.

As an agent of the state, a prosecutor has a constitutional duty to assure a fair trial to the defendant; such constitutional duty includes the prosecutor's obligation to: (1) reveal evidence favorable to the defendant, (2) correct testimony that he knows is untrue, and (3) refrain from the knowing use of perjured testimony. *State* v. *Staten*, 14 App. 3d 78, 14 OBR 91, 470 NE 2d 249 (1984).

Filing of affidavit by prosecuting attorney charging violation of Ohio Revised Code was insufficient where there was no allegation that said affidavit was based upon affidavit of peace officer or private citizen filed with him before his own affidavit was filed. *State* v. *Laughlin*, 10 Misc 219, 225 NE 2d 298 (1966).

In view of the fact that the Municipal Court and the prosecutor have failed to carry out their duties as required by Ohio Traffic Rule 11; (i.e. Municipal Court failed to Rule on pretrial motion to dismiss and prosecutor's failure to reveal that there was no evidence to base a conviction on.)

Petitioner prays this Court grant a Writ of Certiorari in this important case on a defendant's constitutional rights to be free from arrest or warrants that issue without probable cause and are not supported by oath or affirmation. The Court should declare the conviction below, null and void, as the Municipal Court had no evidence to proceed on.

Respectfully submitted,

Robert Sims
615 Park Street
Sidney, Ohio 45365
(513) 492-0125

APPENDIX

(EXHIBIT C)

SIDNEY MUNICIPAL COURT
SHELBY COUNTY

CASE NO. 91-TRD-1995

CITY OF SIDNEY

PLAINTIFF

vs.

ROBERT SIMS

DEFENDANT

MOTION TO DISMISS
(Filed April 22, 1991)

* * *

Comes now Robert Sims, defendant herein and move the Court to dismiss the instant action for lack of substance.

/s/ ROBERT SIMS
615 Park Street
Sidney, Ohio
492-0125

NOTICE

This motion will be heard at the convenience of the Court.

AFFIDAVIT

Comes now Robert Sims, affiant, first being duly cautioned and sworn and state as follows:

(1) On April 12, 1991, I drove my car to J & H Superette on the northeast corner of Park and Oak Avenue.

(2) Backing out of J & H Superette's driveway, I observed a van (vehicle # 3) was blocking my view of the traffic going north on Oak Avenue.

(3) I backed out of the driveway about two (2) feet passed the parked van (vehicle # 3), stopped and turned to see, if any traffic was coming south on Oak Avenue.

(4) Why looking south, a 1978 Chevy Van (vehicle # 2, traveling north on Oak, ran into the right rear quarter panel of my car (vehicle # 1).

(5) I called the police.

(6) The owner of the van (vehicle # 3) that was blocking my view, moved before the police arrived.

(7) The 1978 chevy van (vehicle # 2) that hit me, moved before the police arrived.

(8) On arriving, the police refused to investigate the accident; merely asked me where my car was, said he was giving me a ticket.

(9) The police officer did not get a statement from the other driver as to what happen.

(10) The police officer did not asked witnesses at the scene, what had happen.

(11) The police officer refused to let me explain to him, what had happen.

/s/ ROBERT SIMS

Subscribed and sworn to before me this 22nd day of April, 1991.

My Commission Expires: 3-17-94.

/s/ ANGELA M. WIFORD
NOTARY

CC: Prosecutor

(EXHIBIT D)

IN THE MUNICIPAL COURT, SIDNEY, OHIO 45365

CASE NO. 91-TRD-1995

STATE OF OHIO
CITY OF SIDNEY

PLAINTIFF

vs.

ROBERT SIMS

DEFENDANT

JOURNAL ENTRY
(Filed May 21, 1991)

Attorney: Desired____ Waived____ Appointed____
Name of Attorney _____

( ) Defendant's Plea __Guilty __Not Guilty __No Contest

(✓) Finding ✓Guilty __Not Guilty

( ) The Court has considered the criteria as set forth in ORC 2929.22.

( ) The Court finds this to be defendant's _____ offense within 5 years.

(✓) Fined $25 plus costs. Sentenced to _____ days in jail.

( ) Suspended $_____ of fine. Suspended _____ days in jail.

( ) Suspensions are on condition defendant violate no laws of this state for one year. _____

( ) Credit for 3 days if defendant attends 72 hour intervention program. Credit against fine of $225 for tuition.

( ) Must report to jail by _____ at 8:45 a.m.

( ) Driver license suspended for _____ days.

( ) Occupational driving privileges granted after _____ days upon filing of proof of insurance and letter on employer's letterhead stating work schedule.

( ) May participate in Jail Work Release Program if requirements met.

( ) Continued to _____ for _____.

( ) Time charged to ____Defendant ____State/City____

( ) Case dismissed at request of _____ Costs to be paid by _____.

(✓) Stay is granted for 30 days.

( ) _____

( ) Must participate in Alternative Service Program for payment of fines and costs.

_____

Attorney for Plaintiff

_____

Attorney for Defendant

/s/ Signed by Judge

(EXHIBIT E)

COURT OF APPEALS
THIRD APPELLATE DISTRICT
SHELBY COUNTY

CASE NO. 17-91-14

CITY OF SIDNEY
PLAINTIFF-APPELLEE

v.

ROBERT SIMS
DEFENDANT-APPELLANT

OPINION

CHARACTER OF PROCEEDINGS: Civil appeal from Municipal Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: December 5, 1991

ATTORNEYS:

MR. ROBERT SIMS
615 Park Street
Sidney, Ohio 45365
In Propria Persona

MS. TONYA THIEMAN
City Prosecutor
201 West Poplar Street
Sidney, Ohio 45365
For Appellee

BRYANT, P.J. This is an appeal by defendant-appellant, Robert Sims, from the judgment of the Municipal Court of Sidney, Ohio, finding him guilty of violating City of Sidney Ordinance No. 331.12, improper backing, and sentencing him to pay a fine of Twenty-five and no/100ths Dollars ($25.00) and court costs.

Appellant presents no assignment of error but instead offers the following:

STATEMENT OF ISSUES

> "Is a traffic citation isuued (sic) pursuant to Ohio's (sic) Revised Code Sections 2935.17 and 2937.46 based upon hearsay information that cannot be verified, void Ab (sic) initio and of no legal effect?"

From the argument presented in his brief, we perceive that appellant is asserting error of the trial court by its claimed failure to grant appellant's "motion to dismiss" based upon appellant's assertion that no probable cause existed for issuance of the traffic citation upon which he was found guilty. Because we have identified appellant's relatively straightforward claim of error and in view of his appearance in these proceedings *in propria persona*, although we are not required to do so by App. R. 12(A), in our discretion we proceed to determine if the error complained of is portrayed by the record before us on the appeal.

The record before us for review is a limited one consisting of the Clerk's Transcript of Docket and Journal Entries and the documents listed thereon. Although appellant, in his brief, has set forth statements purporting to be the paraphrased content of certain trial testimony and has appended other matter to that brief, we may not consider such to demonstrate claimed error in lieu of and in the absence of a properly certified transcript of the testimony and proceedings in the case, or one of the appropriate alternatives permitted by the Appellate Rules. It is the rule that assertions of fact contained in appellate briefs and attachments to them cannot

substitute for the record or add to it. *Paulin* v. *Midland Mutual Life Ins. Co.* (1974), 37 Ohio St. 2d 109.

It is incumbent upon the appellant to produce and insure that there is filed in the appeal the record of the trial court proceedings including a transcript of the testimony necessary to portray the error assigned. If no transcript is made, the parties may agree to a statement of the case and evidence and submit that in lieu of a transcript. App. R. 9(C), (D).

It is readily apparent from appellant's argument that the error claimed can only be determined by review of the testimony of the witnesses heard by the trial court. In the absence of a transcript of that testimony, an agreed statement of the facts and evidence or a statement in settlement of the record, we have nothing to review and as the function of this court of appeals is limited to review on appeal of the proceedings of the lower court, we must presume the correctness and regularity of the proceedings below where the appellant has not fulfilled his obligation to show by the record that prejudicial error has occurred.

There is nothing before us from which we can determine objectively the facts upon which a traffic citation was issued to appellant. Likewise, there is nothing before us from which we may determine the evidence upon which the trial court became convinced of appellant's guilt. Indeed, we have nothing before us to demonstrate the entire nature of the proceedings below, the rulings of the trial court or the evidence presented, save that reported in the judgment entry of conviction and sentence.

Accordingly, for the reasons discussed, the judgment of the Municipal Court of Sidney, Ohio is affirmed and the cause is remanded to that court for execution.

Judgment affirmed.

EVANS and SHAW, JJ., concur.

(EXHIBIT F)

IN THE COURT OF APPEALS OF THE
THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
SHELBY COUNTY

CASE NO. 17-91-14

CITY OF SIDNEY
PLAINTIFF-APPELLEE

v.

ROBERT SIMS
DEFENDANT-APPELLANT

JOURNAL ENTRY

For the reasons stated in the opinion of this Court rendered herein on December 5, 1991, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the Sidney Municipal Court is affirmed at the costs of the appellant for which judgment is rendered.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

/s/ THOMAS T. BRYANT
/s/ JOHN R. EVANS
/s/ STEPHEN R. SHAW
JUDGES

DATED: December 5, 1991

(EXHIBIT G)

IN THE COURT OF APPEALS OF THE
THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
SHELBY COUNTY

CASE NO. 17-91-14

CITY OF SIDNEY
PLAINTIFF-APPELLEE

v.

ROBERT SIMS
DEFENDANT-APPELLANT

JOURNAL ENTRY
(Filed January 8, 1992)

This cause came on to be determined on the motion of the appellant to certify the record of this case to the Supreme Court for review and final determination as provided in Article IV, Sec. 3(B)(4) of the Constitution of Ohio.

Upon consideration the court finds that the judgment upon which the judges of this court have agreed is not in conflict with the judgments alleged to be pronounced on the same question by the Court of Appeals of Lorain County in *City of Lorain* v. *Robertson* (1984), 21 Ohio App. 3d 93 and the Ohio Supreme Court in the case of *Teeter* v. *Teeter* (1985), 18 Ohio St. 3d 76.

It is therefore ORDERED that the motion to certify as a conflict case be, and hereby is, OVERRULED.

/s/ THOMAS T. BRYAN
/s/ RONALD E. HADLEY
/s/ JOHN R. EVANS
JUDGES

DATED: January 7, 1992

(EXHIBIT H)

THE SUPREME COURT OF OHIO
1992 TERM
To Wit: May 6, 1992

Case No. 92-186

City of Sidney,

Appellee,

v.

Robert Sims,

Appellant.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Shelby County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Robert Sims.

(Court of Appeals No. 179114)

/s/ THOMAS J. MOYER
Chief Justice